

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

December 13, 2005 Session

**ANN W. McDONALD v. METROPOLITAN GOVERNMENT OF
NASHVILLE AND DAVIDSON COUNTY, TENNESSEE**

**Appeal from the Circuit Court for Davidson County
No. 01C-523 Thomas W. Brothers, Judge**

No. M2004-02852-COA-R3-CV - Filed March 31, 2006

Plaintiff filed this inverse condemnation action to recover damages due to the closure of one end of an alley abutting her property, the closure of which prevented ingress and egress to the next intersecting street. The defendant, the Metropolitan Government of Nashville and Davidson County, denied liability. It contended there was no taking of Plaintiff's property, that the alley was closed for public safety, and thus was an exercise of its police power. The trial court denied Metro's pre-trial motion to dismiss. The matter proceeded to trial by jury. At the close of Plaintiff's proof, Metro moved for a directed verdict. The motion was denied whereupon Metro presented its case in chief. Metro did not renew its motion for a directed verdict at the close of all the proof. Accordingly, the case went to the jury, which awarded Plaintiff \$15,000 in damages. Metro appeals. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and PATRICIA J. COTTRELL, J., joined.

Paul G. Summers, Attorney General and Reporter; Michael E. Moore, Solicitor General; and Larry M. Teague, Deputy Attorney General, for the appellant, Metropolitan Government of Nashville and Davidson County, Tennessee.

Katherine A. Austin, Nashville, Tennessee, for the appellee, Ann W. McDonald.

OPINION

Plaintiff, Ann McDonald, owns improved property at the corner of Old Hickory Boulevard and Gallatin Road. She also owns and operates an insurance agency out of the building on the property. Her building fronts Gallatin Road. Old Hickory Boulevard runs along one side of the property, and the alley at issue runs along the other side.

A drive-through window is located on the side of the building closest to the alley. The alley was used by customers of the insurance agency for ingress and egress to access the drive-through window. The alley was additionally used for two-way traffic and for delivery trucks to make deliveries to Plaintiff's business and several other businesses that abutted the alley.

In 1999, Metro made improvements to the intersection of (new) Old Hickory Boulevard¹ and Gallatin Road, which included widening the intersection and adding a turn lane in front of Plaintiff's property. The improvements also included the addition of curbs and sidewalks. One of the new curbs was constructed at the west end of the alley adjacent to Plaintiff's property, which closed the alley and prevented ingress and egress onto Gallatin Road. As an additional consequence, Plaintiff's customers could no longer use the drive-through window, and Plaintiff lost five parking places located behind her building.²

Plaintiff filed this inverse condemnation action in February of 2001, seeking damages for the "taking" of her property, which Plaintiff contends occurred when Metro closed the west end of the alley adjacent to her property. Metro answered the complaint contending Plaintiff was not entitled to compensation because there had been no taking of Plaintiff's property. Further, Metro contended the road work was an exercise of its police powers for public safety, which did not give rise to a claim for damages.

Metro filed two pre-trial motions seeking dismissal contending the complaint failed to state a claim for which relief could be granted. Each motion was denied, and the case proceeded to trial by jury in February of 2004. At the close of Plaintiff's case in chief, Metro moved for a directed verdict on the same basis it had stated in the previous motion for summary judgment. The motion for directed verdict was denied. Metro then presented its case in chief. Metro did not renew its motion at the close of all the evidence. As a consequence, the case was presented to the jury, which returned a verdict in favor of Plaintiff.

Metro filed a post-trial motion for directed verdict pursuant to Tenn. R. Civ. P. 50.02. The trial court denied the post-trial motion, stating the "case was properly submitted to the jury as a loss of access case." This appeal followed.³

¹"Old" Old Hickory Boulevard was cut off from Old Hickory Boulevard when the location of the intersection of Old Hickory Boulevard with Gallatin Road was moved in the 1960s to facilitate a better flow of traffic. The new intersection is one block north of "Old" Old Hickory Boulevard.

²The parking spaces were needed to afford room for vehicles to turn around and exit onto Old Hickory Boulevard instead of exiting onto Gallatin Road via the alley.

³The procedural history of this case is substantially similar to that in the related case of *E. Richard Corley, Jr., et al., v. Metropolitan Government of Nashville and Davidson County, Tennessee*, No. M2004-02851-COA-R3-CV, because the cases were consolidated in the trial court, and the plaintiffs were represented by the same counsel. The appeals however were not consolidated. A separate opinion in *Corley v. Metro* is being filed with this opinion.

ANALYSIS

Metro's principal contention on appeal is that the closure of the alley adjacent to Plaintiff's property was not compensable because it constituted an exercise of the government's police power for the safety of the public.⁴ This issue, however, was waived due to Metro's failure to renew its motion for a directed verdict at the close of all the proof.

A defendant may seek the dismissal of a claim by several procedural means. One is by a motion to dismiss pursuant to Tenn. R. Civ. P. 12.02. Another is by summary judgment pursuant to Tenn. R. Civ. P. 56. Yet another is by a motion for a directed verdict pursuant to Tenn. R. Civ. P. 50.01.

Metro utilized all three rules to challenge the efficacy of Plaintiff's claim. The first attempt was a Rule 12.02 motion to dismiss at the inception of the action by which Metro asserted Plaintiff had failed to state a claim upon which relief can be granted. The motion was denied without explanation. The second attempt was a motion for summary judgment pursuant to Tenn. R. Civ. P. 56. Metro asserted that there was no genuine issue of material fact, and it was entitled to a judgment as a matter of law because Plaintiff had failed to state a claim for which relief could be granted. *See* Tenn. R. Civ. P. 56.02. The trial court denied the motion for summary judgment finding "there are genuine issues as to material facts in regards to whether or not the landowner . . . suffered a substantial impairment of the right of access to [the] property. . . ."

Although Metro could have, but did not, seek an interlocutory appeal to challenge the denial of its motion for summary judgement, choosing not to pursue an interlocutory appeal did not constitute a waiver of the issue. This is because Metro had yet another opportunity to challenge the efficacy of Plaintiff's case. That opportunity was by moving for a directed verdict at the close of Plaintiff's case in chief pursuant to Tenn. R. Civ. P. 50.01. *See Spann v. Abraham*, 36 S.W.3d 452, 460 (Tenn. Ct. App. 1999)(citations omitted) (holding that if the plaintiff fails to make out a prima facie case, the trial court may direct a verdict even though it earlier denied the summary judgment motion).

A motion for directed verdict may be made "at the close of the evidence offered by an opposing party or at the close of the case." Tenn. R. Civ. P. 50.01. Metro moved for directed verdict at the close of Plaintiff's proof. Although the trial court denied the motion, all was not lost. Metro still had another bite at the apple. This is because it could renew the motion at the close of all the proof. *See* Tenn. R. Civ. P. 50.01. For reasons not adequately explained by the record, Metro did

⁴Metro also contends the claim is barred by the statute of limitations; however, the trial court found Metro waived the defense, that "it came too late," because Metro failed to file an answer to the complaint until the day of trial. We find no error with the trial court's ruling and additionally find that Metro failed to preserve the issue, thus it has been waived.

not renew its motions for a directed verdict at the close of all the proof. As a consequence, the trial court submitted this case to the jury, which returned a verdict awarding Plaintiff \$15,000 in damages.

After the verdict was rendered, Metro filed a motion pursuant to Tenn. R. Civ. P. 50.02 asking the trial court to grant the motion for directed verdict made at trial. The trial court denied the post-trial motion. Its decision was not error because the motion was untimely. Such a motion “must be made at the conclusion of all the proof in order for it to be considered by the trial court on a post trial motion and by this court on appeal.” *Potter v. Tucker*, 688 S.W.2d 833, 835 (Tenn. Ct. App. 1985) (citing Tenn. R. Civ. P. 50.02; Tenn. R. App. P. 3; *Johnson v. Woman’s Hospital*, 527 S.W.2d 133 (Tenn. Ct. App. 1975)). Metro failed to renew its motion for a directed verdict at the close of all the evidence. Failing to do so constituted a waiver of the issue.

Metro additionally seeks to raise as an issue on appeal the denial of its motion for summary judgment.⁵ We find the issue without merit. When the trial court denies a motion for summary judgment upon the finding of a genuine issue as to a material fact, that ruling is not reviewable when there has been a judgment rendered after a trial on the merits. *Hobson v. First State Bank*, 777 S.W.2d 24, 32 (Tenn. Ct. App. 1989) (citing *Mullins v. Precision Rubber Products*, 671 S.W.2d 496, 498 (Tenn. Ct. App. 1984); *Tate v. County of Monroe*, 578 S.W.2d 642, 644 (Tenn. Ct. App. 1978)).

Metro additionally contends it did not waive its challenge because it objected to the jury instruction regarding the issue. This contention is without merit because Metro did not raise this issue in its motion for a new trial. “[I]n all cases tried by a jury, no issue presented for review shall be predicated upon . . . jury instructions [being] granted or refused, . . . unless the same was specifically stated in a motion for new trial; otherwise such issues will be treated as waived.” Tenn. R. Civ. P. 3(e) (emphasis added). Metro’s only post-trial motion was a Rule 50 motion asking the judge to grant the motion for directed verdict. The post-trial motion did not specifically challenge the jury instruction on the legal issue of compensability.

The judgment of the trial court is affirmed, and this matter is remanded with costs of appeal assessed against Appellant, Metropolitan Government of Nashville and Davidson County.

FRANK G. CLEMENT, JR., JUDGE

⁵ Metro’s brief indicates the appeal of issues that differ from the notice of appeal. Metro’s notice of appeal notices the trial court’s final order, which orders Metro to pay Plaintiff the \$15,000 that the jury believed Plaintiff was entitled and to further pay the actual court costs. Metro’s brief, on the other hand, makes no argument regarding the factual reasonableness of the jury’s award, but argues only about whether Plaintiff sustained a compensable injury; i.e., whether Metro acted pursuant to its police power or its power of eminent domain. Metro’s brief fails to cite to anything in the record challenging the jury verdict.